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In the Supreme Court
OF THE
United States

OCTOBER TERM 1968

No. 552

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Petitioner,
vs.
STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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The application by the Ninth Circuit of its "half sight" rule as a rule of law without regard to radar information as a circumstance results in a construction of Rule 16(a) which is contrary to the statute (former 33 U.S.C. §145n; present 33 U.S.C. §1077) and is in conflict with its own earlier decision and the practice of mariners, presenting an important question requiring Supreme Court review 6

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No.

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
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vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on July 8, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted at page i in Appendix I,

infra and the memorandum opinion of the District Court is reprinted at page ii of Appendix I, *infra*; neither opinion has yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit affirming the judgment in this case of maritime collision of the District Court for the Northern District of California filed February 28, 1967, was entered on July 8, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The District Court for the Northern District of California, the Honorable Albert C. Wollenberg, decreed that damages be equally divided between petitioner and respondent with respect to the August 29, 1965, collision off the Golden Gate between petitioner's freighter "ROTTI" and respondent's tanker "J. H. TUTTLE". The Court of Appeals for the Ninth Circuit affirmed on July 8, 1968. The questions here presented are:

1. Whether, as a matter of law, it is a violation of the "moderate speed" injunction of Rule 16(a) (33 U.S.C. §145n, §1077) for a vessel to proceed in fog at a speed such that she is unable to stop within one-half her range of visibility (the so-called "half-sight" rule applied in the Ninth Circuit) even though she is effectively using efficient radar?

2. If the navigational faults of the more-to-blame vessel are numerous and grave and the fault of the less-to-blame vessel, if any, is violation of the "half-sight" rule as applied in the Ninth Circuit:

A. Does federal law require that the benefit of the American rule (sometimes known as the "major-minor fault" rule) be denied the less-to-blame vessel in determining whether it is chargeable with contributing fault; or (alternatively)

B. If the less-to-blame vessel is so denied the benefit of the major-minor fault rule and held guilty of contributing fault, does federal law require that the total collision damages be divided equally, however slight the relative fault of the less-to-blame vessel?

STATUTES AND RULES INVOLVED

The pertinent statutes are Rules 16(a) and (b) and 25(a) of the *International Rules for the Prevention of Collisions at Sea* (33 U.S.C. §145n and 146i). These statutes in force at the time of the collision, together with their counterparts (33 U.S.C. §1077(a) (b) and (c)) which became effective September 1, 1965, are set forth in full in Appendix II.

STATEMENT

This suit arose out of a collision in fog at approximately 6:57 p.m. (1857) P.D.T., August 29, 1965, in the entrance channel to San Francisco Bay between the in-

bound freighter "ROTTI" and the outbound tanker "J. H. TUTTLE".

At the commencement of trial, respondent abandoned the factual theories on which it had proceeded up to that point (C.T. 59, 60 and 61)[1] and conceded fault on the part of the "J. H. TUTTLE" (R.T. 5)[2] admitting that the "J. H. TUTTLE" had navigated in the manner described by the "ROTTI" witnesses (R.T. 6) as confirmed by the testimony of independent witness, U. S. Navy flyer Scott B. Wilkes (R.T. 130) who was overhead at the time; Lt. Wilkes' statement and contemporaneous sketches (Libelant's Exhibit 7 at the trial) are included in the certified records.

A summary of the facts of the collision appears in Appendix IV hereto, where brief notations of the navigation of each vessel, keyed to the record, have been superimposed on a photocopy of the revelant portion of U. S. Coast Guard chart 5532, which was respondent's Exhibit 1 at the trial and which bears the notations made by Pilot Sever as he testified at the trial in the District Court. The District Court's description of the navigational events contains some obvious inaccuracies which, however, are not in particulars affecting the questions presented here.

The "ROTTI" before entering fog reduced to her "full harbor maneuvering" speed of 12 knots, commenced blowing the whistle signals called for by Rule 15 and assigned a qualified officer to her radar whose exclusive

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[1] "C.T." herein refers to "Clerk's Transcript."

[2] "R.T." herein refers to "Reporter's Transcript."

duties were to observe, plot and report radar observations. The "ROTTI" observed the "J. H. TUTTLE" on her radar at about 3½ miles and thereafter, as detailed in Appendix IV, the "ROTTI" put her engines successively on "stop", "half ahead", "full ahead", "full astern", "stop" and "full astern" as appropriate to the varying aspects displayed by the "TUTTLE" as she changed her course from one parallel to the north side of the channel to one across and southbound outside the channel to one parallel and outbound south of the channel up to the "J. H. TUTTLE's" hard right turn which brought her back into the channel and into collision with the "ROTTI".

Petitioner proceeded with the trial in the District Court contending that the grave faults of the "J. H. TUTTLE" fully accounted for the collision and were so great as to require any technical fault or debatable error of judgment on the part of the "ROTTI" to be excused under equitable application of the "major-minor fault" rule. Alternatively, petitioner contended that if some fault of the "ROTTI" were found to have contributed to the collision, damages should be divided in proportion to the relative degrees of fault (C.T. 144, 174) in accordance with the rule prevailing in other maritime nations, there having been no definitive statement of the United States Supreme Court precluding a proportionate division of damages.

Respondent proceeded with the trial contending (1) that the gravity of the "J. H. TUTTLE's" fault was irrelevant, (2) that the "ROTTI's" entering fog at a speed greater than permitted her to stop in one-half her visi-

bility was, as a matter of law, a stautory violation of Rule 16(a) (33 U.S.C. §145n (a)) regardless of the fact that she was making effective use of an efficiently manned radar (R.T. 381 line 16), and (3) that any fault found against the "ROTTI", however slight, required the Court to divide damages equally (C.T. 36, 160). The District Court, agreeing with respondent's contentions, found the "ROTTI" guilty of contributing fault and decreed that petitioner bear a full one-half of the total damages resulting from the collision.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which on July 8, 1968, affirmed without comment.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION BY THE NINTH CIRCUIT OF ITS "HALF-SIGHT" RULE AS A RULE OF LAW WITHOUT REGARD TO RADAR INFORMATION AS A CIRCUMSTANCE RESULTS IN A CONSTRUCTION OF RULE 16(a) WHICH IS CONTRARY TO THE STATUTE (FORMER 33 U.S.C. § 145n; PRESENT 33 U.S.C. § 1077) AND IS IN CONFLICT WITH ITS OWN EARLIER DECISION AND THE PRACTICE OF MARINERS, PRESENTING AN IMPORTANT QUESTION REQUIRING SUPREME COURT REVIEW.

Petitioner urges the Court to accept this case for review because the principles involved are of great practical importance to pilots, shipowners and all others who are responsible for the navigation of vessels. The immediacy of the navigational questions is highlighted by technical developments in radar and other low visibility navigational equipment, similar to that employed by the

"ROTTI", which are routinely employed in air and space navigation at speeds which are multiples of hundreds, and even thousands, of the "ROTTI's" 12 knots which the District Court condemned as excessive as a matter of law.

Radar and other low visibility devices are tools which are at least partially designed to allow speedier and more efficient operation of seagoing vessels. That efficiently manned radar is a "circumstance" to be considered in judging as "moderate" a speed which might be deemed excessive in the absence of such radar, would appear patent, under the wording of the statute, under the holding of the Court of Appeals for the Ninth Circuit in *The Beaver* (9th Cir. 1918) 253 Fed. 312, 314, 315 and as would appear placed beyond question by the September 1, 1965, Addition of the Annex to the rules (33 U.S.C. §1094 See Appendix II). In insisting on rigid application of its "half-sight" rule, the Ninth Circuit rejects the use of radar as a circumstance in determining the moderateness of speed under Rule 16(a) and similarly rejects the practical experience of skilled navigators such as the San Francisco Bar Pilots, who, it was said by an independent witness, usually proceed in the channel in fog "on a full bell" (R.T. 130).

II.

THE CONSTRUCTION OF RULE 16(a) (FORMER 33 U.S.C. § 145n; PRESENT 33 U.S.C. § 1077) BY THE NINTH CIRCUIT'S APPLICATION OF ITS "HALF-SIGHT" RULE WITHOUT REGARD TO RADAR INFORMATION CONFLICTS WITH THE INTERPRETATION GIVEN THIS IMPORTANT NAVIGATIONAL RULE IN THE SECOND CIRCUIT.

It is evident that in the present case the District Court, as it was urged by the respondent (see Appendix III), applied, unmodified, the Ninth Circuit's "half-sight" rule, the classic statement of which appears in the *Silver Palm:*

> "One of the very long-established principles of law in maritime navigation is that a vessel shall not proceed in a fog at a speed at which she cannot be stopped dead in the water in one-half the visibility before her" (The *Silver Palm* (9 Cir. 1937) 94 F.2d 754, 757).

This rule is elsewhere herein referred to as the "half-sight" rule.

The rule of interpretation of a moderate speed as applied in the Second Circuit, in cases not involving the additional information provided by radar, has been the "full-sight" rule as stated in *Anglo-Saxon Petroleum Co. v. United States* (Judge Learned Hand) (2 Cir. 1955) 222 F.2d 75, 77:

> ". . . as everybody knows, the courts have imposed a gloss upon this that 'moderate speed is that at which, if the other vessel also does her duty, the vessel will be able to stop her way before they collide.' ", (citing *The Nacoochee,* 137 U.S. 330, *The Umbria,* 166 U.S. 404 and other cases).

The difference between the approaches taken by the Courts of Appeal for the Second Circuit and for the Ninth Circuit is clearly pointed up in Judge Learned Hand's opinion in *Oil Transfer Corp. v. Westchester Ferry Corp.* (SDNY 1958), 173 F. Supp. 637:

> "It is quite true that the generally accepted rule is that a vessel may travel in a fog at a speed that will allow her to stop within the distance of the existing visibility if she meets another vessel who can also stop within that distance. That would of course mean half the distance of the visibility if the meeting vessel was moving at the same speed, and the Ninth Circuit appears to have made this the test. We have left the question open without such a fixed test: and happily I am not called upon to decide the point here for the following reasons . . . ."

Of even greater moment than the conflict between the Circuits with respect to use of a "half-sight" rule of interpretation as against a "full-sight" rule in this day of increasingly sophisticated electronic aids to low visibility navigation, is the Ninth Circuit's rigid adherence to its "half-sight" rule, disregarding as a circumstance to be considered in gauging the moderateness of speed, the information available through radar. In comparison, the Second Circuit has expressly rejected the suggestion that the "sight rule" is to be rigidly applied, affirming the spirit of the statute that the determination of "moderate speed" under Rule 16 (a) is to be judged in light of all circumstances. Judge Medina stated for the Second Circuit in the *Polarusoil/The Sandefjord* (2 Cir. 1956) 236 F.2d 270, 272:

> "'But these are not rules of thumb to be applied willy-nilly. They are but glosses upon the basic rule

requiring operation at a moderate speed, and, like it, they must be applied according to the particular circumstances of each case . . . . The purpose of the statute, spelled out in the 'sight rule', is to require generally and not absolutely that a vessel proceed only at such speed that it can stop before striking another vessel which comes into the range of its vision."

III.

AN ASSERTED TECHNICAL VIOLATION OF THE NINTH CIRCUIT'S "HALF-SIGHT" RULE BY A LESS-TO-BLAME VESSEL NAVIGATING WITH EFFICIENT RADAR IS NOT A PROPER BASIS FOR DENYING THE BENEFIT OF THE AMERICAN "MAJOR-MINOR FAULT" RULE TO THE LESS-TO-BLAME VESSEL.

The citation by the District Court, incorporated and confirmed by the Court of Appeals for the Ninth Circuit, of *Afran Transport Company v. The Bergechief* (S.D. N.Y. 1959) 170 F. Supp. 893 suggests that both Courts in judging the moderateness of the "ROTTI's" speed under Rule 16 (a) improperly applied the tests of Rule 16 (b) which are not involved in this case as they apply only after the navigating vessel has heard the fog signal of another vessel forward of its beam.

It is fundamental and long established that the determination of moderate speed depends upon contributing circumstances and that considerable weight is to be given the judgment of the vessel's navigators. As was stated in *Lie v. San Francisco and Portland SS Co.* ([1917] 243 U.S. 291, 296):

> "The most cursory reader of this rule (Rule 16) must see that . . . the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog. . . ."

The classic pronouncements of the "major-minor fault" rule are readily found in cases in which the fault claimed against the exonerated vessel was immoderate speed under conditions of reduced visibility:

The Umbria (1897), 166 U.S. 404, 409

> "Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *Alexandre v. Machan* ("*The City of New York,*" 147 U.S. 72, 85, and *The Ludvig Holberg,* 157 U.S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor. . . ."

and further at page 417:

> "But in cases of this kind much depends upon the density of the fog, and something must be left to the judgment and discretion of the master."

The Ludvig Holberg (1895), 157 U.S. 60, 67, 71:

> "She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow for four or five minutes before the collision she cannot be held in fault for what her previous speed may have been. If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed . . . As was said in *Alexandre v. Machan* 147 U.S. 72, 85, 'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such a vessel to raise a doubt with regard to the management of the other vessel . . .'"

As appears in the foregoing classic statements of the American Rule, in a case such as the present where the "J. H. TUTTLE's" faults so fully explain the collision, and may well have placed it beyond any power of the "ROTTI" to avoid, it was inequitable and indeed contrary to federal case law to fail to resolve in the radar-equipped "ROTTI's" favor whatever minor doubt there may have been concerning the moderateness of her quite normal speed on entering the fog.

As is stated in *Griffin on Collision* at page 299:

> "However, all the cases of moderate and immoderate speed turn on questions of prudence or negligence. They cannot be solved merely by applying mechanical tests. Such a rule-of-thumb as the 'visible distance' test has its uses, but it should not be applied blindly without considering all of the surrounding conditions which bear on the question of negligence."

Although every authority [see Gilmore and Black, *The Law of Admiralty*] has criticized the American practice of dividing collision damages equally as unfair to the vessel less to blame, and although the "major-minor fault" rule has been criticized as a somewhat cumbersome and imperfect palliative to the practice of dividing damages equally:

> "An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations. Indeed, the doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cer-

> berus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." Chief Judge Learned Hand dissenting in *National Bulk Carriers v. United States* (2 Cir. 1950) 183 F.2d 405, 410

it is clear that if the American practice of dividing damages equally is not jettisoned in this case, the circumstances require that the American "major-minor fault" rule be applied to avoid inflicting upon the "ROTTI" an unfair share of the financial loss caused by the grossly culpable navigation of the "J. H. TUTTLE", as was recognized by the Court of Appeals for the Second Circuit in the factually very similar case of *United States v. Shaw, Savill & Albion Co.* (2 Cir. 1949) 178 F.2d 849, 851.

IV.

IF THE AMERICAN "MAJOR-MINOR FAULT" RULE IS NOT APPLIED TO EXONERATE THE "ROTTI", THE EXTRAORDINARY INEQUITY OF THE RESULTING EQUAL DIVISION OF DAMAGES REQUIRES THAT THE SUPREME COURT REVIEW THIS IMPORTANT QUESTION AND ISSUE ITS CLARIFYING DETERMINATION THAT AMERICAN LAW, CONSONANT WITH THE LAW OF MARITIME NATIONS, PERMITS DAMAGES IN CASES OF MARITIME COLLISION TO BE DIVIDED IN PROPORTION TO THE FAULT OF THE VESSELS.

In the circumstances of the present case, an American practice that collision damages be divided equally, modified by application of the American "major-minor fault" rule exonerating the "ROTTI" gives a result which does not do violence to sensibilities of justice. Since it is highly questionable that there was any fault on the part

of the "ROTTI", exoneration of the "ROTTI" under application of the "major-minor fault" rule would approximate the result which would be expected under a system dividing damages in proportion to fault.

No such apology can be made for the practice of dividing damages equally if, in cases such as the present, the application of the practice is not ameliorated by application of the major-minor" fault rule.

It is apparent that in the present case the District Court read the dictum of the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling Corp.* (1952) 342 U.S. 282 as requiring it to divide damages equally. We submit that the District Court, and the Court of Appeals, erred in so reading the Supreme Court's expression in the *Halcyon Lines* case, and that this error, in conjunction with their failure to apply the "major-minor fault" rule makes manifest the necessity that the Supreme Court accept for review the question whether American maritime law affirmatively requires that maritime collision damages be divided equally regardless of how disproportionate the contributing fault of the two vessels.

The decisions on the subject have been ably reviewed in detail in *McKeel v. Schroeder,* (N.D. Cal. 1963) 215 F. Supp. 756, which decreed an unequal division of damages proportionate to fault, after concluding that the decisions of this Court did not preclude it from so doing. A similar result and conclusion was reached by the late Judge Miner in *N. M. Patterson & Sons, Limited v. City of Chicago* (N.D. Ill. 1962) 209 F. Supp. 576, which was reversed on other grounds in an opinion in which the Court of Appeals for the Seventh Circuit, *N. M. Patterson & Sons,*

Limited v. City of Chicago (7 Cir. 1963) 324 F. 2d 254, 257 stated (we suggest it was not as a ground of decision) that the decisions of the United States Supreme Court did affirmatively require that damages in mutual fault maritime collision cases be divided equally, relying particularly on the opinion of the Supreme Court in *The Atlas* (1876) 93 U.S. 302. It is remarkable that the case before this Court in *The Atlas* was one in which the cargo of an innocent barge had elected to sue only one of two other vessels whose faulty navigation had sunk the barge. The decision was to the effect that the innocent cargo could recover full damages from one offending vessel at fault even though, if both offending vessels had been before the Court, damages might have been divided between the offending vessels. The matter of the degree of apportionment of damages between the offending vessels was a matter much too remote from the case before the Court to serve as any proper basis for the illusion that there has been any determinative decision of the Supreme Court requiring that damages be divided equally in cases involving mutual fault. The status of the cases, and the basis of the error which has developed in several circuits is well discussed in Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases* (1957) 45 Cal. L. Rev. 304.

A helpful analysis and review of the analogous cases involving personal injury in which a proportional division of damages has been allowed, stemming from the Supreme Court's decision in *Max Morris* (1890) 137 U.S. 1 is given in Judge Frank's opinion for the Second Circuit in *Ahlgren v. Red Star Towing & Transp. Co.* (1954) 214 F.2d 618.

CONCLUSION

A writ of certiorari should be granted to assure that the principles of maritime law involved in the questions presented are properly understood and applied in the several circuits.

Dated, San Francisco, California,
September 18, 1968.

Respectfully submitted,

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Of Counsel

(Appendices Follow)

Appendix I

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

OPINION OF COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JULY 8, 1968

United States Court of Appeals
for the Ninth Circuit

No. 22,050

N.V. STOOMVAART MAATSCHAPPIJ, "NEDERLAND" and the S.S. "ROTTI",
Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.;
Appellees.

[July 8, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and CARTER, Circuit Judges, and FOLEY, District Judge*

PER CURIAM:

The district court filed a written opinion, *Standard Oil Company of California v. The S.S. ROTTI*, ____F.S.____.

On the basis of that opinion, the judgment is Affirmed.

*Hon. Roger D. Foley, United States District Judge, District of Nevada, sitting by designation.

OPINION OF THE DISTRICT COURT
DATED JULY 2, 1959

In the United States District Court
for the Northern District of California

No. 29,545
IN ADMIRALTY

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Libelant,

vs.

THE S.S. ROTTI, her engines, tackle, apparel and appurtenances, and N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND", a corporation,
Respondents.

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND", a corporation,
Cross Libelant,

vs.

THE S.S. J. H. TUTTLE, her engines, tackle, apparel and appurtenances, and STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Cross Respondents.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Claimant.

MEMORANDUM OPINION

This is an action in Admiralty arising as a result of a collision between the S.S. Rotti, owned by respondent N.V. Stoomvaart Maatschappij "Nederland", and the

S.S. J. H. Tuttle, owned by libelant Standard Oil Company of California. At the start of the trial herein, the Tuttle conceded its fault, so that the only question remaining is whether the Rotti is entitled to recover on its cross-libel.

The collision occurred on August 29, 1965 at 18:57 in the Main Ship Channel in the entrance to San Francisco Bay between buoys 4 and 6, closer to buoy 4. The Rotti was proceeding inbound on the southern side of the channel on a course of 70°; the Tuttle, at the time of collision, was on a course of approximately 325°, resulting from a last minute hard turn to starboard. The bow of the Rotti collided with the port side of the Tuttle, closer to the bow.

The Rotti first became aware of the Tuttle when her radar showed the Tuttle as an outbound vessel heading in a westerly direction on the northern part of the channel. The Rotti was then proceeding at about 12 knots. She entered the fog bank which she had earlier seen developing around buoy 4 at the same speed of 12 knots. She did not make any substantial change in her engine speeds until 18:52, when she saw the Tuttle on her radar proceeding southerly across the channel. At this time, the Rotti put her engines at stop. She remained at stop for only one-half minute, changing her engines to half ahead then full ahead when the Tuttle appeared to be proceeding westerly on the south side of the channel. At 18:54½, the Rotti put her engines at stop-full astern when her radar showed the Tuttle to be heading back into the channel. However, she put her engines back to stop at 18:55, when her radar showed the Tuttle apparently proceeding on a course parallel to the channel and that of the Rotti's.

At 18:56, it was clear from the Rotti's radar that the Tuttle was turning back into the channel, and her engines were put at full astern. The accident occurred one minute later.

In attempting to exonerate herself from liability, the Rotti relies on what she terms her "prudent and careful response" to the Tuttle's "navigational" acts. While it is true from the evidence that the Rotti's response to the Tuttle's erratic and unexplained maneuvers was based on the use of information gained from radar, this use of radar in and of itself is not sufficient to exempt the Rotti from the "moderate speed" requirement of Rule 16(a) of the International Rules for Preventing Collisions at Sea, which provides in part:

> Every vessel . . . . shall, in fog . . . . or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

The Radar Amendment to Rule 16 [33 U.S.C. § 1077(c), effective September 1, 1965] provides:

> A power-driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually may take early and substantial action to avoid a close-quarters situation, but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop her engines in proper time to avoid collision and then navigate with caution until danger of collision is over.

This rule must be read in conjunction with the Annex to the Rules (33 U.S.C. § 1094, effective September 1, 1965) which reads in part:

(2) A vessel navigating with the aid of radar in restricted visibility must, in compliance with Rule 16(a), go at a moderate speed. Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed. In this regard it must be recognized that small vessels, small icebergs and similar floating objects may be not detected by radar. Radar indications of one or more vessels in the vicinity may mean that "moderate speed" should be slower than a mariner without radar might consider moderate in the circumstances.

While these rules were not in effect at the time of the collision, the parties are in agreement that they reflect the standard of care required of ships having radar at that time. See, e.g., *Skibs A S Siljestad v. S S Mathew Luckenbach,* 215 F.Supp. 667 (S.D.N.Y. 1963).

Using these rules as a standard in the instant case, the Court is of the opinion that the Rotti was going at an immoderate speed in violation of Rule 16(a), *supra,* when she entered the fog at 12 knots. While she did "see" the Tuttle on radar and apparently knew its course at the time of entering the fog, the Rotti was under a duty to reduce her speed when entering the fog so as to avoid the possibility of collision. *The Julia Luckenbach,* 219 Fed. 600 (E.D. Va. 1914), affd. 239 F.2d 94 (4th Cir. 1916); *The Edward E. Loomis,* 86 F.2d 705 (2nd Cir. 1936); *Villain & Fassio E Compagnia v. Tank Steamer E. W. Sinclair,* 207 F.Supp. 700 (S.D.N.Y. 1962).

The burden is thus put on the Rotti to show that this statutory violation could not have contributed to the collision with the Tuttle. *The Pennsylvania,* 86 U.S. 125

(1873); *Anglo-Saxon Petroleum Co. v. United States,* 224 F.2d 86 (2d Cir. 1955). The Court is of the opinion that the Rotti had some headway through the water at the time of impact. We reach this conclusion in light of the records introduced into evidence relating to the engine speeds of the Rotti from the time she picked up her pilot at 18:33 until the time of collision. (Lib. Exh. 6; Hoedemaker Deposition). Although there was testimony that the Rotti was stopped dead in the water at the time of collision, this Court cannot ignore the fact that the Rotti's first stop at 18:52 was ineffectual to slow her progress through the water, in light of her maneuvers to one-half and then full ahead one half minute later. The Rotti must have been going close to her original 12 knots at 18:54½, two and one-half minutes prior to the collision. Her maneuvers thereafter were not enough to stop her dead in the water at the time of impact. If she had been moving at moderate speed when entering the fog, instead of at 12 knots, she would have avoided the collision.

Again, this Court refers to the requirement of Rule 16(c), *supra.* We read this amendment, particularly the requirement to take "early and substantial" action, as placing a duty on the Rotti in the instant case to at least have *remained* at "stop" five minutes before the collision until the risks of collision were over; in other words, the law placed a duty on the Rotti, when "sighting" the Tuttle via radar to take meaningful action at an early time, not at the last minute. All the Rotti needed to do was to stop and wait until the Tuttle had passed her safely, instead of kicking her engines ahead five minutes before the collision. See *Afran Transport Company v. The Bergechief,* 170 F.Supp. 893 (S.D.N.Y. 1959).

In light of what we have said above, damages will be apportioned equally between the parties. *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952). The amount of such damages will be determined at a later date to be set by this Court. Libelant will prepare findings of fact, conclusions of law, and judgment not inconsistent with this opinion.

SO ORDERED.

Dated: February 28, 1967

Albert C. Wollenberg
United States District Judge

Filed February 28, 1967,
James P. Welsh, Clerk.

Appendix II

STATUTES AND RULES INVOLVED

A. Rules in effect at time of collision, August 29, 1965.

SPEED IN FOG

Rule 16 (a) (33 U.S.C. § 145n):

"(a) Every vessel, or seaplane when taxi-ing on the water shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"(b) A power-driven vessel hearing, apparently, forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

NARROW CHANNELS AND BENDS THEREIN

Rule 25 (a) (33 U.S.C. § 146i):

"(a) In a narrow channel, every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

B. Rules which became effective September 1, 1965.

SPEED IN FOG

Rule 16 (a) (33 U.S.C. § 1077):

"(a) Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms, or any other condition similarly restricting visibility, go

at a moderate speed, having careful regard to the existing circumstances and conditions.

"(b) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

"(c) A power-driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually may take early and substantial action to avoid a close-quarters situation, but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop her engines in proper time to avoid collision and then navigate with caution until danger of collision is over.

ANNEX TO THE RULES
(33 U.S.C. § 1094)

Recommendations on the use of radar information as an aid to avoiding collisions at sea.

"(1) Assumptions made on scanty information may be dangerous and should be avoided.

"(2) A vessel navigating with the aid of radar in restricted visibility must, in compliance with Rule 16(a), go at a moderate speed. Information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed. In this regard it must be recognized that small vessels, small icebergs and similar floating objects may be not detected by

radar. Radar indications of one or more vessels in the vicinity may mean that "moderate speed" should be slower than a mariner without radar might consider moderate in the circumstances.

"(3) When navigating in restricted visibility the radar range and bearing alone do not constitute ascertainment of the position of the other vessel under Rule 16(b) sufficiently to relieve a vessel of the duty to stop her engines and navigate with caution when a fog signal is heard forward of the beam.

"(4) When action has been taken under Rule 16(c) to avoid a close quarters situation, it is essential to make sure that such action is having the desired effect. Alterations of course or speed or both are matters as to which the mariner must be guided by the circumstances of the case.

"(5) Alteration of course alone may be the most effective action to avoid close quarters provided that:

"(a) There is sufficient sea room.

"(b) It is made in good time.

"(c) It is substantial. A succession of small alterations of course should be avoided.

"(d) It does not result in a close quarters situation with other vessels.

"(6) The direction of an alteration of course is a matter in which the mariner must be guided by the circumstances of the case. An alteration to starboard, particularly when vessels are approaching apparently on opposite or nearly opposite courses, is generally preferable to an alteration to port.

"(7) An alteration of speed, either alone or in conjunction with an alteration of course, should be substantial. A number of small alterations of speed should be avoided.

"(8) If a close quarters situation is imminent, the most prudent action may be to take all way off the vessel."

Appendix III

EXTRACTS FROM DISTRICT COURT RECORD ON QUESTIONS HERE PRESENTED

A. Conclusions of Law as stated by District Court (C.T. 180, 181)

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

1. The "Tuttle" by its admission, committed faults which contributed to the collision.

2. The "Rotti's" 12-knot speed upon entering the dense fog was immoderate and in violation of Rule 16(a) of the International Rules for Preventing Collisions at Sea. Had she slowed to a moderate speed upon entering the fog and thereafter navigated prudently, the collision would not have happened. Her failure to slow to a moderate speed was a fault which contributed to the collision.

3. The "Rotti" should have recognized that a risk of collision existed at least as early as 1852 when she observed the position of the "Tuttle" on radar and first stopped her engines. Had she remained at stop after 1852 the collision would not have happened. Her failure to remain at stop and wait until danger of collision was over was a fault which contributed to the collision.

4. The "Rotti's" kick of her engines to full ahead in the dense fog, less than five minutes before the collision, was imprudent. Had she not done so the collision would not have happened. Her kick ahead of her engines was a fault which contributed to the collision.

5. The "Rotti" failed to meet the standard of care required of ships having radar as set forth in the Radar Amendment to Rule 16 (33 U.S.C. 1077(c)) in the respects set forth above.

6. The conclusions set forth in the memorandum of opinion of the Court, filed on February 28, 1967, are adopted as additional conclusions of law herein.

7. Both the "Tuttle" and the "Rotti" committed substantial faults which contributed to the collision. In accordance with the general maritime rule in cases such as these, damages shall be apportioned equally between the parties.

* * * * *

B. Remarks of District Court following conclusion of evidence, extracted from Reporter's Transcript.

(R.T. 380 line 13 to line 20):

Mr. Buxton (Trial counsel for respondent herein): Half-sight, full-sight; in the Ninth Circuit the rule of Silver Palm still applies and in other circuits it's variously articulated, but the same rules apply. All I am saying, Your Honor, is that radar does not reduce or make the requirement of moderate speed more lenient.

The Court: All right. I don't think there is any discussion about that.

(R.T. 402 lines 8 to 17):

There's no case that they have found that's been cited, and I couldn't find any, that says that speed in the fog or failure to stop when you have knowledge of something ahead of you in a fog is a minor fault. It's just not a minor fault.

The Court: I agree with you there.

Mr. Buxton: Major-minor fault just doesn't apply.

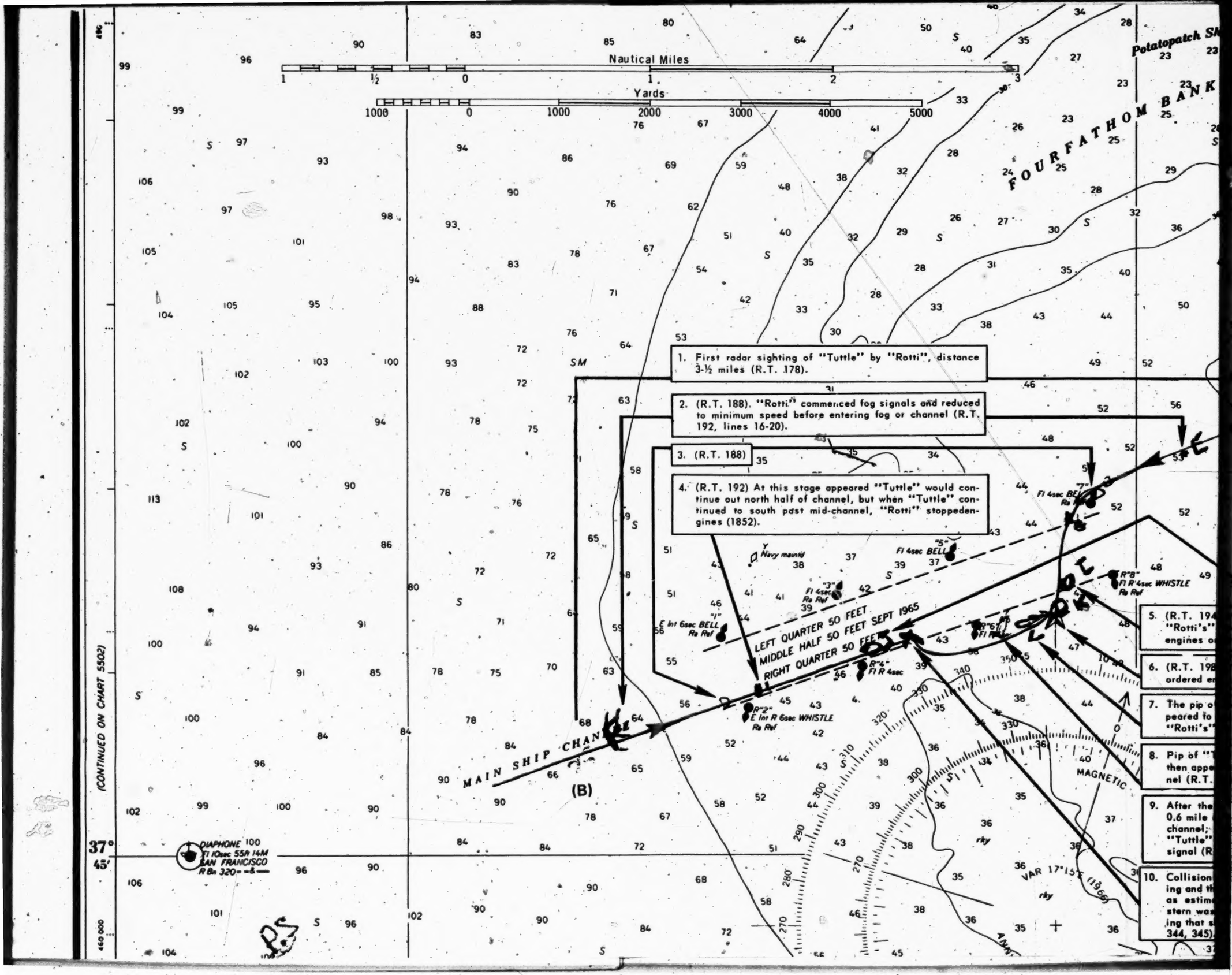
The Court: I think that's correct.

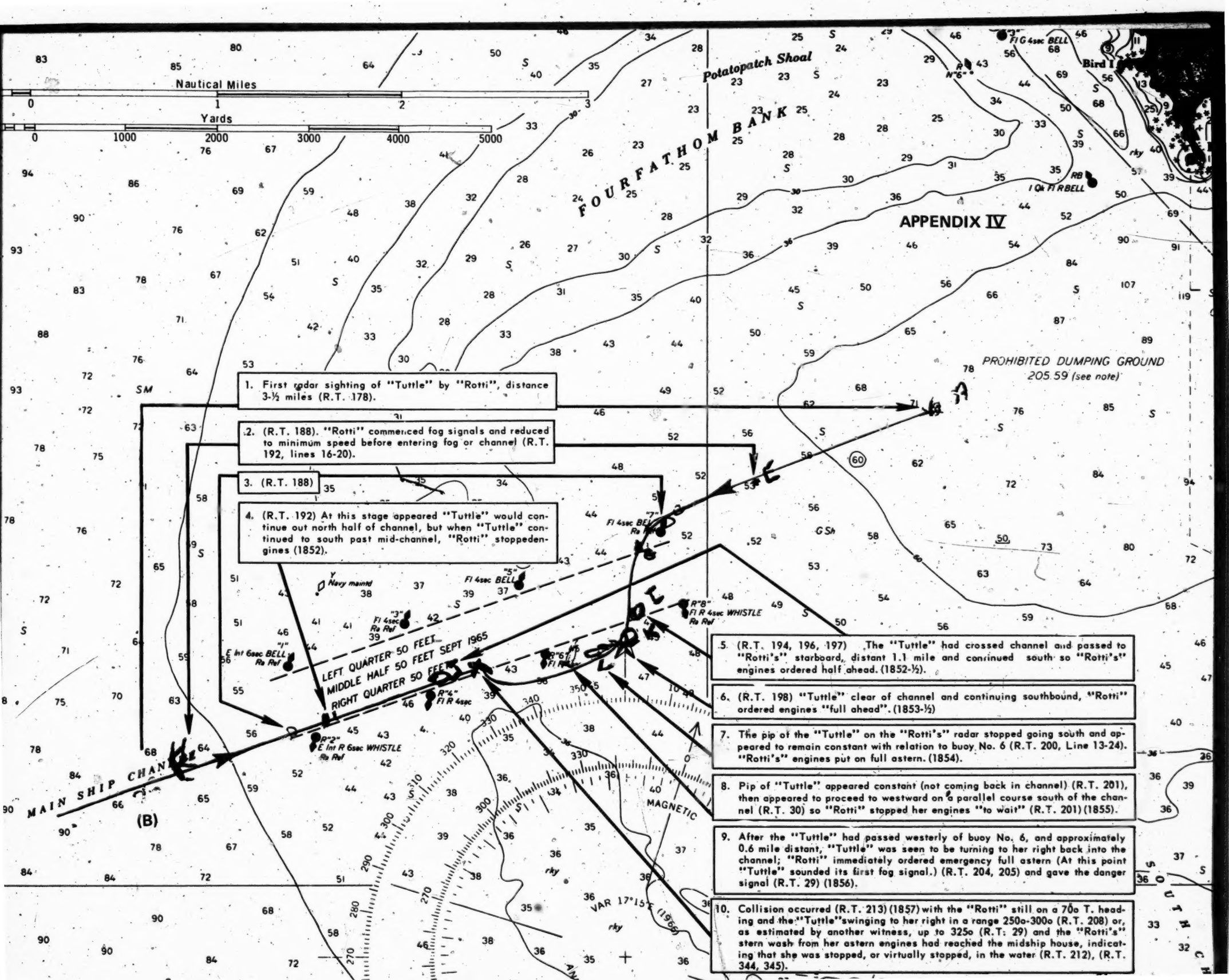
(R.T. 407 lines 13 to 20):

Mr. Buxton: But the rule of Silver Palm does not depend upon hearing a blast. The rule of Silver Palm is under Rule 16(a), which says you have got to go at moderate speed.

The Court: Moderate speed; and they attempt to define what moderate speed is—so as to be able to stop within half the distance of your visibility.

Mr. Buxton: Within half the distance of your visibility.


Nautical Miles
1 ½ 0 1 2 3
Yards
1000 0 1000 2000 3000 4000 5000
FOURFATHOM BANK
Potatopatch SH
1. First radar sighting of "Tuttle" by "Rotti", distance 3-½ miles (R.T. 178).
2. (R.T. 188). "Rotti" commenced fog signals and reduced to minimum speed before entering fog or channel (R.T. 192, lines 16-20).
3. (R.T. 188)
4. (R.T. 192) At this stage appeared "Tuttle" would continue out north half of channel, but when "Tuttle" continued to south past mid-channel, "Rotti" stoppedengines (1852).
LEFT QUARTER 50 FEET
MIDDLE HALF 50 FEET SEPT 1965
RIGHT QUARTER 50 FEET
MAIN SHIP CHANNEL
(B)
Navy mantid
Fl 4sec BELL
"5"
"3"
Fl 4sec
Ra Ref
E Int 6sec BELL
Ra Ref
"1"
R"8"
Fl R 4sec WHISTLE
Ra Ref
R"6"
Fl R 4sec
R"2"
E Int R 6sec WHISTLE
Ra Ref
MAGNETIC
VAR 17°15'E (1965)
DIAPHONE 100
Fl 10sec 55ft 14M
SAN FRANCISCO
R Bn 320°-8
37°
45'
(CONTINUED ON CHART 5502)
460 000


Nautical Miles
0 1 2 3
Yards
0 1000 2000 3000 4000 5000
Potatopatch Shoal
FOURFATHOM BANK
APPENDIX IV
PROHIBITED DUMPING GROUND
205.59 (see note)
1. First radar sighting of "Tuttle" by "Rotti", distance 3-½ miles (R.T. 178).
2. (R.T. 188). "Rotti" commenced fog signals and reduced to minimum speed before entering fog or channel (R.T. 192, lines 16-20).
3. (R.T. 188)
4. (R.T. 192) At this stage appeared "Tuttle" would continue out north half of channel, but when "Tuttle" continued to south past mid-channel, "Rotti" stoppedengines (1852).
5. (R.T. 194, 196, 197) The "Tuttle" had crossed channel and passed to "Rotti's" starboard, distant 1.1 mile and continued south so "Rotti's" engines ordered half ahead. (1852-½).
6. (R.T. 198) "Tuttle" clear of channel and continuing southbound, "Rotti" ordered engines "full ahead". (1853-½)
7. The pip of the "Tuttle" on the "Rotti's" radar stopped going south and appeared to remain constant with relation to buoy No. 6 (R.T. 200, Line 13-24). "Rotti's" engines put on full astern. (1854).
8. Pip of "Tuttle" appeared constant (not coming back in channel) (R.T. 201), then appeared to proceed to westward on a parallel course south of the channel (R.T. 30) so "Rotti" stopped her engines "to wait" (R.T. 201) (1855).
9. After the "Tuttle" had passed westerly of buoy No. 6, and approximately 0.6 mile distant, "Tuttle" was seen to be turning to her right back into the channel; "Rotti" immediately ordered emergency full astern (At this point "Tuttle" sounded its first fog signal.) (R.T. 204, 205) and gave the danger signal (R.T. 29) (1856).
10. Collision occurred (R.T. 213) (1857) with the "Rotti" still on a 70o T. heading and the "Tuttle" swinging to her right in a range 250o-300o (R.T. 208) or, as estimated by another witness, up to 325o (R.T. 29) and the "Rotti's" stern wash from her astern engines had reached the midship house, indicating that she was stopped, or virtually stopped, in the water (R.T. 212), (R.T. 344, 345).
LEFT QUARTER 50 FEET
MIDDLE HALF 50 FEET SEPT 1965
RIGHT QUARTER 50 FEET
MAIN SHIP CHANNEL
(B)
MAGNETIC
VAR 17°15' (1966)
Bird I
"3" Fl G 4sec BELL
"7" Fl 4sec BELL Ra Ref
"5" Fl 4sec BELL
"3" Fl 4sec Ra Ref
"1" E Int 6sec BELL Ra Ref
"2" E Int R 6sec WHISTLE Ra Ref
"4" Fl R 4sec
"6" Fl R
"8" Fl R 4sec WHISTLE Ra Ref
N"6"
I Qk Fl R BELL
Navy mannd
SM
GSA

BRARY
E COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 15 1968
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM 1968

No. 552

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1968

No. 552

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any important or novel questions.

The district court found that petitioner's vessel, the Rotti, committed substantial faults which contributed to the collision with respondent's vessel, the Tuttle. The court found that: (1) the Rotti's failure to reduce its

full ahead speed of 12 knots upon entry into a dense fog was, under the circumstances, a violation of the moderate speed requirement of Rule 16(a) of the International Rules for Preventing Collisions at Sea (Appx. I to Pet., pp. iv-v; 286 F.Supp. 679[1]) and, alternatively, (2) the Rotti's speed and its maneuvers after observing the Tuttle on radar were in violation of the standard of care as codified in the Radar Amendment to the Rules (Appx. I to Pet., pp. v-vi; 286 F.Supp. 680).[2] Accordingly the district court decreed that damages should be divided between the parties (Appx. I to Pet., p. vii; 286 F.Supp. 680). The court of appeals affirmed on the basis of the opinion of the district court (Appx. I to Pet., p. i).

STATUTES INVOLVED

The statutes involved in this case are Rule 16 of the International Rules for Preventing Collisions at Sea (former 33 U.S.C., sec. 145n; 65 Stat. 417), the Radar Amendment (33 U.S.C., sec. 1077; 77 Stat. 205) and its Annex (33 U.S.C., sec. 1094; 77 Stat. 209). These statutes are set forth in Appendix II to the Petition (pp. viii-xi). Also pertinent to the case is the introductory section to the Radar Amendment (33 U.S.C., sec. 1075; 77 Stat. 203) which is set forth in the Appendix to this brief.

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[1]The decision of the district court has now been reported (*Standard Oil Company of California v. S.S. Rotti* (N.D.Cal. 1967) 286 F.Supp. 677).

[2]At trial, both parties agreed that the standard of care as codified in the Radar Amendment was applicable to this case, even though the amendment was not effective as a statute at the time of the collision (Rep.Tr. 8, 11; Appx. I to Pet., p. v; 286 F. Supp. 679).

QUESTIONS PRESENTED

The questions stated by petitioner (Pet., pp. 2-3) are not accurate. The court of appeals affirmed the decision of the district court which had determined that, under the circumstances, the Rotti's failure to reduce its full ahead speed of 12 knots upon entry into a dense fog was a violation of the moderate speed requirements of Rule 16(a). In addition, the district court found that the Rotti also committed serious faults in its subsequent navigation. The courts below did not apply, or even mention, the so-called "half sight" rule referred to in petitioner's statement of the questions presented (Pet., p. 2).

The questions presented, therefore, are:

1. Was there substantial evidence to support the district court's findings of fault?

2. Does the so-called "major-minor fault" rule apply when a vessel has proceeded at an immoderate speed in violation of Rule 16(a)? and

3. Should the established rule of equal division of damages be reconsidered in this case in which the petitioning party has been found to have committed substantial and serious contributing faults?

STATEMENT OF THE CASE

Petitioner incorporates (Pet., pp. 4-5) into its statement of the case a chart (attached to the Petition as Appendix IV) which purports to describe the navigation of the Rotti. Neither that chart nor petitioner's statement fully or accurately sets forth the navigational facts upon which the district court relied in finding that the Rotti

committed substantial faults which contributed to the collision. For example, petitioner asserts that the Rotti "reduced to a minimum speed before entering fog or channel" (Appx. IV to Pet., notation 2). Yet, the district court found that the Rotti was proceeding at about 12 knots and entered the fog at the same speed (Appx. I to Pet., p. iii; 286 F.Supp. 678). That finding is in accord with the record (Rep.Tr. 41, lines 1-7, 175, line 25, to 176, line 8, 189, lines 15-19, 192, lines 12-24).[3] In view of petitioner's inaccurate presentation, we set forth the relevant navigational acts of the Rotti:

As the district court found, the Rotti first became aware of the Tuttle when her radar showed "an outbound vessel heading in a westerly direction on the northern part of the channel" (Appx. I to Pet., p. iii; 286 F. Supp. 678). The Rotti was then proceeding at about 12 knots and she entered the fog, which she had earlier seen developing, at the same speed (ibid.). Visibility was no more than 200 to 250 feet and the fog was so dense that the bow of the Rotti could hardly be seen from her bridge (Rep. Tr. 43, 206). On her radar, the Rotti observed the Tuttle crossing the channel but made no change in speed until the Tuttle was dead ahead (Rep. Tr. 194; Appx. I to Pet., p. iii; 286 F.Supp. 678-679). At that time the Rotti put her engines on stop (ibid.). Such action was ineffectual to slow down the Rotti as

[3] Similarly, in the tenth notation on the chart, petitioner asserts that at the time of the collision the Rotti "was stopped, or virtually stopped, in the water." Petitioner thus ignores the district court's finding (Appx. I to Pet., p. vi; 286 F.Supp. 680), supported by substantial evidence (Rep.Tr. 211, lines 6-13; 272, lines 2-8; 308, line 14, to 308A, line 15), that the Rotti had headway at the time of the collision.

merely took the power off and there was no braking power other than the friction of the water (Rep.Tr. 194-195, 277-279; Appx. I to Pet., p. vi; 286 F. Supp. 680).

The Rotti remained on stop for only one-half minute and then changed her engines to half ahead and then full ahead as the Tuttle appeared, on the radar, to be proceeding across the channel (Rep.Tr. 156, 196-197; Appx. I to Pet., p. iii; 286 F.Supp. 679). Although the bearing of the Tuttle never exceeded 15 degrees relative off the Rotti's bow, the Rotti's pilot assumed that the Tuttle would proceed across the channel and go south (Rep.Tr. 196-198).

The Rotti continued ahead until its radar showed that the Tuttle was in fact proceeding back toward the Rotti (Rep.Tr. 86, 198-200; Appx. I to Pet., p. iii; 286 F.Supp. 679). The Rotti went on stop and then full astern (Rep. Tr. 200-201; Appx. I to Pet., p. iii; 286 F.Supp. 679). However, in less than a minute the Rotti's pilot eliminated the braking effect of the full astern and returned the engines to stop (ibid.). The Rotti's master explained that a stop was ordered because it was assumed that the Tuttle, which was then only 10 degrees relative off the Rotti's bow and closing (Rep.Tr. 64-65, 66-67, 85-86, 202), would proceed on a course parallel to the Rotti on the outside of the southern boundary of the channel (Rep.Tr. 30, 54). The pilot, on the other hand, frankly admitted "I didn't know exactly then what he [the Tuttle] was going to do, whether he was going to stay there or not" (Rep.Tr. 224, lines 5-7). He decided to "wait and see what's going to happen" (Rep.Tr. 201, line 25, to 202, line 1).

The Rotti continued to glide ahead on stop as the Rotti and the Tuttle came closer and closer together and as, in the words of the Rotti's radar officer, "a dangerous situation" developed (Rep.Tr. 87, line 7). The Rotti was finally put on full astern when it became apparent on her radar that the Tuttle had turned back into the channel (Rep.Tr. 202-203, 204-205; Appx. I to Pet., p. iv; 286 F.Supp. 679). The collision occurred within one minute thereafter (Rep.Tr. 157; Appx. I to Pet., p. iv; 286 F.Supp. 679). At the time of the collision, the Rotti had substantial headway (Rep.Tr. 211, lines 6-13, 272, lines 2-8) and the Tuttle was swinging away from the Rotti (Rep.Tr. 207-209).

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS ARE SUPPORTED BY THE EVIDENCE, AND THE DECISION BELOW CORRECTLY APPLIES THE APPLICABLE STATUTES AND IS CONSISTENT WITH THE LAW AS APPLIED IN OTHER CIRCUITS.

Petitioner's principal argument is founded upon its erroneous assertion that the Ninth Circuit based its affirmance of the district court upon a "rigid application of its 'half-sight' rule" (Pet., p. 7). However, the decisions below make no reference whatever to the so-called "half-sight" rule and neither court applied any such rule. The district court found that the Rotti's failure to reduce its full ahead speed of 12 knots upon entry into the dense fog was, under the circumstances, a violation of Rule 16(a).[4] The court, after reviewing the evidence, referred

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[4]Contrary to the implication in petitioner's brief (pp. 5-6), respondent's counsel did present this argument to the district court (see, e.g., Rep.Tr. 376, lines 20-25; 392, line 23, to 393, line 8; Cl.Tr.

to Rule 16(a) and the Radar Amendment and determined that "the Rotti was under a duty to reduce her speed when entering the fog so as to avoid the possibility of collision" (Appx. I to Pet., p. v; 286 F.Supp. 679). This finding is in accord with decisions from other circuits which have found a violation of Rule 16(a) when a ship fails to reduce speed upon entry into dense fog.

United States v. M/V Wuerttemberg (4 Cir. 1964) 330 F.2d 498, 503;

The Sylvan Arrow (2 Cir. 1939) 104 F.2d 102, 104, certiorari denied (1939) 308 U.S. 603;

Moore-McCormack Lines v. The Esso Camden (S.D.N.Y. 1951) 99 F.Supp. 334, 339;

The Julia Luckenbach (E.D.Va. 1914) 219 Fed. 600, 604-605, affirmed (4 Cir. 1916) 239 Fed. 94.[5]

It is therefore plain that the district court did not ignore the Rotti's use of radar—or any other "circumstance"—in favor of "rigid adherence" to some "technical" rule. On the contrary, the district court expressly rejected petitioner's argument that the Rotti's "use of radar in and of itself" excused her high speed in fog (Appx. I

10, line 7, to 12, line 4). The fact that respondent's counsel also argued that the Rotti violated both the "half-sight" and "full-sight" rules (see Pet., pp. 5-6, 8; Appx. III to Pet., pp. xiii-xiv) is, of course, irrelevant.

[5]Petitioner's assertion (Pet., pp. 8-10) that the decision below conflicts with decisions of the Second Circuit is manifestly erroneous. In finding the Rotti's speed immoderate under the circumstances, the district court cited (Appx. I to Pet., p. v; 286 F. Supp. 679) two decisions from the Second Circuit which found violations of Rule 16(a) under similar circumstances (*The Edward E. Loomis* (2 Cir. 1936) 86 F.2d 705, 708; *Villain & Fassio E. Compagnia v. Tank Steamer E. W. Sinclair* (S.D.N.Y. 1962) 207 F.Supp. 700, 707, affirmed (2 Cir. 1963) 313 F.2d 722, certiorari denied (1963) 373 U.S. 948).

to Pet., p. iv; 286 F.Supp. 679). This rejection is in accord with the Radar Amendment to the Rules which expressly provides that

> "The possession of information obtained from radar does not relieve any vessel of the obligation of *conforming strictly* with sections 1061-1094 of this title *and, in particular,* the *obligations contained in sections 1076 and 1077* [Rule 16] *of this title*" (33 U.S.C. 1075.1; 77 Stat. 203; emphasis added).[6]

In addition, the Annex to the Rules provides that "[a] vessel navigating with the aid of radar in restricted visibility *must,* in compliance with Rule 16(a), go at a moderate speed," and that "[r]adar indications of one or more vessels in the vicinity may mean that 'moderate speed' should be *slower* than a mariner without radar might consider moderate in the circumstances" (Appx. II to Pet., pp. ix-x; emphasis added). In the instant case, the Rotti failed to reduce her speed even though she was aware of the existence of an outbound vessel before she entered the fog. And, as shown in the statement of the case (supra pp. 4-6), the Rotti's maneuvers thereafter were based upon erroneous assumptions derived from insufficient information. The Radar Annex plainly warns that: "Assumptions made on scanty information may be dangerous and should be avoided" (Appx. II to Pet., p. ix).

It is clear that the use of radar does not excuse compliance with moderate speed requirements. As the Court of Appeals for the Second Circuit has observed,

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[6]This statutory provision which was omitted from petitioner's Appendix II is set forth as the Appendix to this brief.

> "* * * the mere use of radar does not justify a failure to obey the rules of navigation generally applicable. Radar is an additional safeguard, * * * but a master who relies on radar alone and disregards any or all other precautions and requirements, statutory or otherwise, does so at his own risk [citing authorities]. Indeed, it is surprising how many collisions continue to occur despite the fact that both vessels are equipped with and are operating radar. We have already had occasion to comment on the fact that by giving a false sense of security radar, when not properly used, may 'increase the chances of collision'" (*Afran Transport Co. v. The Bergechief* (2 Cir. 1960) 274 F.2d 469, 472-473).

Petitioner's suggestion (Pet., pp. 7-8) that the courts should sanction full speed through the narrow San Francisco ship channel in dense fog because such is, assertedly, "the practice of mariners" does not merit serious consideration. When presented with a similar argument as to an alleged practice of proceeding at full speed through fog, this Court replied "However this may be, the custom is not one to which the courts can lend their sanction, as it implies a flagrant disregard of the safety of other vessels" *(The Umbria* (1897) 166 U.S. 404, 409).

The decisions below plainly present no conflict with decisions in other circuits nor do they represent a "rigid adherence" to any particular rule of speed. The district court's finding that the Rotti violated Rule 16(a) is consistent with the applicable statutory law and cases in other circuits and it is supported by the evidence. The court of appeals, therefore, correctly affirmed the judg-

ment of the district court (*McAllister v. United States* (1954) 348 U.S. 19, 20).

II. THERE IS NO BASIS FOR APPLICATION OF THE SO-CALLED "MAJOR-MINOR FAULT" RULE.

In the heading to Point III (p. 10), petitioner erroneously states that "an asserted technical violation of the Ninth Circuit's 'half-sight' rule" was the basis for denying the Rotti the benefit of the "major-minor fault" rule. However, as pointed out in the preceding discussion, the so-called "half-sight" rule is not involved in this case. The district court clearly determined—without reference to any "technical" rule—that the Rotti's action in proceeding at a full ahead of 12 knots into a dense fog was a violation of Rule 16(a) (Appx. I to Pet., p. v; 286 F. Supp. 679). The district court therefore correctly applied (Appx. I to Pet., pp. v-vi; 286 F.Supp. 679-680) the rule which placed upon the Rotti the burden of showing that this serious statutory violation could not have contributed to the collision.

Lie v. San Francisco & Portland S. S. Co. (1917) 243 U.S. 291, 298;

The Pennsylvania (1873) 10 Wall. (86 U.S.) 136;

States Steamship Co. v. Permanente Steamship Corp. (9 Cir. 1956) 231 F.2d 82, 88;

Anglo-Saxon Petroleum Co. v. United States (2 Cir. 1955) 224 F.2d 86, 87.

Petitioner's suggestion (Pet., p. 10) that the district court and the court of appeals somehow confused Rule 16(b) with Rule 16(a) is totally without foundation. During trial, the parties had agreed that the Radar Amend-

ment, including Rule 16(c), although not effective as a statute at the time of the collision, reflected the applicable standard of care (Rep.Tr. 8, 11; Appx. I to Pet., p. v; 286 F.Supp. 679). The district court found that the Rotti had violated that standard of care (Appx. I to Pet., p. vi; 286 F.Supp. 680) and, in support of that finding, cited *Afran Transport Company v. The Bergechief* (S.D. N.Y. 1959) 170 F.Supp. 893, which applied Rule 16(b). That citation does not indicate that the court was confused as to the applicability of Rule 16(b). It cited the *Afran* case because the provisions of Rule 16(b) are analogous to those of Rule 16(c).

Petitioner apparently urges (Pet., p. 11) that its immoderate speed in violation of Rule 16(a) should be ignored as a "minor" fault. Such an argument is contrary to the principle that strict enforcement of the statutory rules is necessary to prevent collisions. As this Court has observed,

> "[W]hen, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute" (*The Pennsylvania* (1873) 10 Wall. (86 U.S.) 136).

The cases cited by petitioner (p. 11) are not to the contrary. In each, the court below had found, on con-

flicting evidence, that one vessel alone had committed serious and substantial faults (*The Umbria* (1897) 166 U.S. 404, 408-409; *The Ludvig Holberg* (1895) 157 U.S. 60, 70-71). The pronouncements of the so-called "major-minor fault" rule were made in answer to attempts to impeach those findings (ibid.). Contrary to petitioner's assertion (Pet., p. 11), in neither case was the "major-minor fault" rule applied with respect to immoderate speed (see 166 U.S. 412-413; 157 U.S. 70-71). Petitioner has cited no case, and we are aware of none, in which the "rule" has been applied to a serious and substantial statutory violation such as the violation of Rule 16(a) involved in this case.

III. THE DISTRICT COURT CORRECTLY DECREED THAT THE DAMAGES SHOULD BE DIVIDED BETWEEN THE PARTIES.

The district court decreed that damages should be apportioned in accord with "the historic admiralty rule of divided damages in mutual fault collisions" which, "for more than 100 years, has governed * * * the correlative rights and duties of the two ship owners whose vessels have been involved in a collision in which both were at fault" (*Weyerhaeuser S. S. Co. v. U. S.* (1963) 372 U.S. 597, 600, 603). This Court has clearly stated the applicable rule:

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each. * * * This maritime rule is of ancient origin and has been applied in many cases * * *" (*Halcyon Lines v. Haenn Ship Corp.* (1952) 342 U.S. 282, 284).

Petitioner's argument that the rule should be altered in this case is founded upon the erroneous assertion that "it is highly questionable that there was any fault on the part of the 'Rotti'" (Pet., pp. 13-14). The record, however, shows that the Rotti committed serious and substantial faults: first, in her failure to reduce her full ahead speed of 12 knots upon entry into the dense fog, and second, in her navigation thereafter. This is plainly an inappropriate case in which to alter the long-established rule of divided damages.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated at San Francisco, California,
October 17, 1968.

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(Appendix Follows)

Appendix

33 U.S.C. section 1075 (77 Stat. 203):

"1. The possession of information obtained from radar does not relieve any vessel of the obligation of conforming strictly with sections 1061-1094 of this title and, in particular, the obligations contained in sections 1076 and 1077 of this title.

"2. The Annex to the Rules contains recommendations intended to assist in the use of radar as an aid to avoiding collision in restricted visibility."